ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
PER CURIAM

DIVISION II

CACR07-279

March 19, 2008

JASON BABB
APPELLANT
v.
STATE OF ARKANSAS
APPELLEE

AN APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT
[CR 2004-701 I]

HONORABLE JOHN HOMER WRIGHT, CIRCUIT JUDGE

SUBSTITUTED OPINION ON DENIAL OF PETITION FOR REHEARING

Jason Babb was convicted by a Garland County jury of murdering Melanie Pasley and was sentenced to thirty-five years' imprisonment. On appeal, Babb argues that there was insufficient evidence supporting his conviction; the trial court erred in denying his motion to suppress certain seized evidence; the court erred in denying his motion to suppress his custodial statement; the court erred in excluding testimony that he was willing to take a polygraph test; the court erred in denying his motion to quash the jury panel; and the court erred in denying his motion to reduce his sentence. We find no error and affirm.

Melanie Pasley, Babb's twenty-four-year-old former girlfriend and the mother of his two children, was found dead in her apartment on April 9, 2004. Pasley was pregnant at the

time of her death. There were no signs of forced entry into her apartment, but there were signs of a struggle, as well as blunt-force trauma to her head, and signs that she was suffocated.

Babb was developed as a suspect after the police questioned several witnesses. He was initially charged with two counts of first-degree murder for the murders of Pasley and her unborn child. The State, however, withdrew the second count and tried Babb solely for the murder of Pasley. The jury convicted Babb and sentenced him to a thirty-five year prison term. Babb appeals from his judgment and commitment order.

I. Sufficiency of the Evidence

Babb first argues that there is insufficient evidence supporting his first-degree murder conviction. Babb asserts that the State failed to offer any proof linking him to Pasley's murder. We disagree. The evidence was sufficient to sustain his conviction because it was of such a force and character that the jury did not have to speculate in reaching its verdict.

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *See Adkins v. State*, 371 Ark. 159, __ S.W.3d __ (2007); *Gorman v. State*, 366 Ark. 82, 233 S.W.3d 622 (2006). We will affirm if there is substantial evidence to support the conviction. *See Adkins*, *supra*; *Gorman*, *supra*. Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation and conjecture. *Dunn v. State*, 371 Ark. 140, __

S.W.3d ___ (2007); *Adkins*, *supra*; *Gorman*, *supra*.

Circumstantial evidence may constitute substantial evidence to support a conviction when it excludes every other reasonable hypothesis than that of the guilt of the accused. *Dunn*, *supra*. The jury's responsibility is to determine whether the circumstantial evidence excludes every other reasonable hypothesis consistent with innocence. *Terry v. State*, 371 Ark. 50, ___ S.W.3d ___ (2007). On review, we determine whether the jury resorted to speculation and conjecture in reaching its verdict. *See id.*

A person commits murder in the first degree if, with the purpose of causing the death of another person, he causes the death of another person. Ark. Code Ann. § 5-10-102(a)(2) (Repl. 2006). Arkansas Code Annotated section 5-2-202(1) (Repl. 2006) provides that a person acts purposely when it is his conscious object to engage in conduct of that nature or to cause the result. *See Navarro v. State*, 371 Ark. 179, ___ S.W.3d ___ (2007). A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003); *Winbush v. State*, 82 Ark. App. 365, 107 S.W.3d 882 (2003). Moreover, a person is presumed to intend the natural and probable consequences of his or her actions. *Dunn*, *supra*. Because intent cannot be proven by direct evidence, jurors are allowed to draw upon their common knowledge and experiences to infer it from the circumstances. *Id*. The intent necessary to sustain a first-degree murder conviction may also be inferred from the nature, extent, and location of the wounds to the victim. *Robinson,*

supra; *Winbush*, *supra*.

Pasley worked the late shift at Wendy's and got off work at 3:30 a.m. on the morning of April 9, 2004. She was last seen alive driving away from her work-place in her white Chevrolet Suburban. Pasley was found dead at her apartment later that morning by her mother.

Linda Rogers testified that she worked with Babb. On April 8, Babb asked Rogers if he could borrow her gray Suzuki sports utility vehicle. Babb called Rogers at 1 a.m. on April 9 and asked her to pick him up, but told her not to tell anyone that she was picking him up. Babb told her to stop in front of his house and not to pull into the driveway.

When Rogers picked up Babb, he was wearing gray sweat pants and a white t-shirt, and he had a white hand-towel wrapped around his neck. Rogers and Babb drove to Rogers's house, where Babb dropped her off shortly after 2 a.m. and left in her car. Babb returned to Roger's house at 4:30 a.m. When Rogers asked Babb where he had been, he replied that things had not gone as he had planned and that he needed to get back home. Rogers inquired about a Wal-Mart bag that was on the seat of her car Babb, however, would not tell her what was in the bag. Instead, he grabbed it and placed it on the driver's side floor board and told her that he needed to dispose of it.

As Babb drove them back to his home in Mountain Pine, he told Rogers that she might receive a phone call from the police later that day. Rogers asked Babb what he had done and he replied that it was best that Rogers not know and that, if she did receive a phone call from

the police, she was not to tell them that he had borrowed her car. At this point, Rogers noticed that Babb was wearing a black t-shirt instead of the white one that he was wearing earlier. She also noticed that Babb was wearing brown shoes. When they arrived in Mountain Pine at 5 a.m., Babb stopped the car a block away from his house, got out, and walked toward his house.

Rogers was asked by the police, later that day, to come to the station for questioning. She called Babb and asked what was going on and he told her not to worry. When she reached the station, Rogers allowed the police to search her car. The next day, Babb called Rogers and asked whether she told the police that he borrowed her car. When she confirmed that she had, he became upset and told her that he had never borrowed her car. The following Monday, Babb told Rogers that he had committed murder but that he did not commit the murder for which he and Rogers were being questioned. Babb later called Rogers and asked whether the police had taken carpet samples from her home.

Rogers further testified that, prior to Pasley's death, Babb told her that he did not want more children. When she told Babb that it was the woman's decision and not his, Babb replied, "Yeah, I will kill the b****." Babb also once told her that it was easy to kill someone in Hot Springs and to dispose of the body so that noone would ever find it.

Hot Springs Police Officer Chris Chapmond testified that Babb gave the police a statement on April 9 in which he denied killing Pasley and denied leaving his home on the night in question. Babb told the police that he fell asleep while watching television, woke

up at 1:30 a.m, went to look for something in his car, then came back inside and went to bed. The police obtained two DNA samples from Babb.

Detective Tim Smith testified that Pasley's route to and from work required her to drive past the Park Avenue Shell Station, which had roof-top video surveillance capturing Park Avenue. While viewing the footage taken on April 9, Detective Smith observed that a white sports utility vehicle, matching Pasley's vehicle, drove north on Park Avenue past the Shell station at 3:26:11 a.m. He also observed that at 3:26:54, forty-three seconds later, a small silver sports utility vehicle, matching the description of Rogers's vehicle, traveled north on Park Avenue past the Shell station. He observed, that at 4:20:50, the same silver sports utility vehicle traveled south on Park Avenue past the Shell station.

The officers also testified that two search warrants were issued for Babb's home. During the execution of the first warrant, Babb was wearing gray sweat pants similar to the ones Rogers said he was wearing on April 9. The officers recovered a Kyocera cell phone battery, which Babb said was from a broken cell phone that he was returning. The broken cell phone was later determined to be a Samsung, which was incompatible with the Kyocera battery. It was also later determined that Pasley owned a Kyocera cell phone that was missing. In addition to seizing Babb's cell phone and the battery, the officers seized two pairs of gray sweat pants. The officers also seized a pair of tan tennis shoes and a pair of suede tennis shoes from Babb's vehicle. All items were submitted to the state crime lab.

Forensic testing determined that blood found on Babb's shoe matched Pasley's blood.

The testing also revealed that carpet fibers taken from the driver's side floor board of Rogers's car matched the carpet in Pasley's home. There was also testimony establishing that the carpet in Pasley's home was unique.

The state medical examiner testified that Pasley's death was caused by blunt force head trauma with smothering. She also had multiple defensive wounds. The examiner surmised that Pasley was struck in the face or that she had her head and face pushed or slammed against an object. He said that a towel could be used to smother someone.

Pasley's mother, Lola Pasley, testified that Babb was the only man with whom her daughter was involved in April 2004 and that her daughter's pregnancy was causing conflict between Babb and Pasley. The morning that she found her daughter's body, she informed the police that Babb had abused her daughter on previous occasions. She also told the police that Pasley's jacket and cell phone were missing.

Foronne Lollis testified that he dated Pasley but that she broke up with him because she was still in love with Babb. He recalled that, while dancing with Pasley at a local night club in January 2004, Babb walked up to Pasley and threatened to hit her in the face with a metal detector if she did not sit down. He said that Pasley sat down and that she left with Babb approximately thirty minutes later.

Shirley Dugan, the victim's neighbor, heard bumping noises and someone screaming for help on the night in question. She dismissed it and returned to sleep because it was not uncommon to hear these sounds in her apartment complex. Dugan testified that Pasley

owned a Kyocera telephone. Dugan's cell phone records revealed that on April 9 at 3:48 a.m., a phone call was made to her from Pasley's cell phone.

When all of this evidence is considered, it is clear that the jury did not have to resort to speculation to reach its guilty verdict. Therefore, we affirm on this point.

II. Motion to Suppress the Evidence

In reviewing a circuit court's denial of a motion to suppress evidence, appellate courts conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Omar v. State*, 99 Ark. App. 436, __ S.W.3d __ (2007). The circuit court's ruling is reversed only if it is clearly against the preponderance of the evidence. *Id*.

The police obtained two search warrants for Babb's home in Mountain Pine based upon the statements of Linda Rogers. Babb lived at home with his parents, and during the first search, the police seized personal items belonging to Babb as well as items belonging to Pasley. During the second search, the police recovered carpet samples from Babb's home.

Babb argues that the trial court erred in failing to suppress the evidence seized pursuant to the warrants because the affidavit for search warrant failed to set forth particular facts bearing on Rogers's reliability. Babb is mistaken because Rogers was not a confidential informant and her identity was known. Therefore, the affidavit for search warrant was not required to have a statement as to her veracity and reliability. *Stanton v. State*, 344 Ark. 589,

42 S.W.3d 474 (2001). No additional support for the reliability of a witness is required when the witness volunteers the information as a good citizen and is not a confidential informant whose identity is protected. *Id*. Therefore, the trial court correctly denied Babb's motion to suppress, and we affirm on this point.

III. Motion to Suppress Custodial Statement

Babb's third argument is that the trial court erred in denying his motion to suppress the statement he gave the police while in custody, because the statement was made involuntarily. The trial court denied the motion, finding that the statement was made intelligently, knowingly, and voluntarily. We agree and affirm the trial court's ruling.

The denial of a motion to suppress a custodial statement is reviewed de novo based on a totality of the circumstances. *Young v. State*, 370 Ark. 147, ___ S.W.3d ___ (2007). In conducting this review, we examine the circuit court's findings of fact for clear error and determine whether those facts give rise to reasonable suspicion or probable cause. *Id.* Deference is given to the circuit court's findings and the inferences drawn by the court. *Id.* The trial court's ruling will be reversed only if it is clearly against the preponderance of the evidence. *Dondanville v. State*, 85 Ark. App. 532, 157 S.W.3d 571 (2004).

A custodial statement is presumed to be involuntary and the State bears the burden of proving that it was given voluntarily and was knowingly and intelligently made. *Id*. When determining whether a statement was given voluntarily, we review whether the statement was the product of free and deliberate choice rather than intimidation, coercion, or deception. *See*

Marshall v. State, 92 Ark. App. 188, 211 S.W.3d 597 (2005). We determine whether the defendant waived his rights with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004). In making this determination, we review the circumstances surrounding the waiver including the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; the use of mental or physical punishment; the statements made by the interrogating officers; and the vulnerability of the defendant. *Dondanville*, *supra*.

The record shows that Babb willingly came to the police station to speak with the police and no promises were made to him. His *Miranda* rights were read to him and he initialed a rights form acknowledging that he understood them. Babb did not ask for an attorney and gave his statement freely. Babb read his type-written statement and initialed and signed it. The record indicates that Babb had the capacity to fully understand his rights because he is a college student and nothing indicates that his mental or physical condition was impaired in any way. Therefore, we affirm on this point.

IV. Motion to Quash the Jury Panel

Babb's fourth argument is that the trial court erred in denying his motion to quash the all-white jury panel. Babb argues that, because he is black and Pasley was white, it was grossly unfair to require him to stand trial with an all-white jury. In support of his motion,

he argued that the jury panel should reflect the population of Garland County, which is fifteen percent black. The trial court denied Babb's motion because it found that no action was taken to exclude potential black jurors. We agree with the trial court and affirm.

The mere fact that no black persons were on the panel from which Babb's jury was selected is not, in itself, cause to quash the panel. *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996). To quash a jury panel based upon its racial make-up, the moving party must prove that people of a certain race were systematically excluded from the panel. *Navarro*, *supra*; *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997). Although the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial, nothing requires that the petit jury mirror the community and reflect the various distinctive groups in the population. *Danzie*, *supra*.

We will reverse a trial court's denial of a motion to quash a jury panel only when there is a manifest abuse of discretion. *Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002); *Black v. State*, 50 Ark. App. 42, 901 S.W.2d 849 (1995). Because no evidence was presented establishing that black people were systematically excluded from the panel, Babb failed to make a prima facie showing of racial discrimination. Therefore, the trial court did not abuse its discretion and we affirm on this point.

V. Reference to Polygraph Test

Babb argues that the trial court erred when it excluded any reference to his willingness to take a polygraph test. The results of polygraph examinations are inadmissible

in all Arkansas courts, *Peters v. State*, 357 Ark. 297, 166 S.W.3d 34 (2004), and a defendant's willingness or unwillingness to take a polygraph test is prejudicial and inadmissible to prove consciousness of innocence or of guilt. *Wingfield v. State*, 303 Ark. 291, 796 S.W.2d 574 (1990); *Hayes v. State*, 298 Ark. 356, 767 S.W.2d 525 (1989). Therefore, we affirm the trial court's exclusion of all statements regarding Babb's willingness to submit to a polygraph test.

VI. Motion for Reduced Sentence

In his last argument, Babb asserts that the trial court committed reversible error when it denied his motion for a reduced sentence. We affirm the trial court's denial of Babb's motion to reduce his sentence because Babb cannot show prejudice. This is true because a defendant who has received a sentence within the statutory range cannot show prejudice from the sentence. *Tate v. State*, 367 Ark. 576, ___ S.W.3d ___ (2006). Babb was found guilty of first-degree murder, a Class Y felony. Ark. Code Ann. § 5-10-102. The sentencing range for Class Y felonies is ten to forty years or life. Ark. Code Ann. § 5-4-401(a)(1) (Repl. 2006). Babb was sentenced to thirty-five years' imprisonment, which is within the statutory range. Further, we will not reverse a trial court's decision on a motion for sentence reduction absent a showing of clear error. *See Riggins v. State*, 329 Ark. 171, 946 S.W.2d 691 (1997). Babb fails to show that the trial court's decision was clearly erroneous, nor does he show that he was prejudiced by his sentence. Therefore, we affirm on this point.

Affirmed.

HART, ROBBINS, GRIFFEN, MARSHALL, and HEFFLEY, JJ., agree.